



**-Summary Judgement
-Triable Issues raised**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 2 OF 2007

ESTATE OF MOHAMED ISHAQ.....PLAINTIFFS

VERSUS

PASSAGLIA GIUSEPPE & 2 OTHERS.....DEFENDANTS

RULING

By a Notice of motion dated 28th February 2011 filed pursuant to the provisions of Order 36 Rule 1, 5 and 6 and Order 51 Rule 1 of the Civil Procedure Rule(2010) the Plaintiffs/Applicants prays that summary judgement be entered in their favour, against the 2nd, 3rd and 4th Defendants in terms of prayer (b) of the Further Amended Plaintiff fled on 16/12/10, then the rest of claims do proceed for full hearing. Applicant also seeks for costs of this application to be provided in any event.

The application is premised on grounds that;-

1. Pursuant to leave granted by this court on 08/12/10, the Plaintiffs filed further amended plaintiff on 16/12/10 which was duly served upon the 2nd and 3rd Defendant`s advocates on 21/12/10 and summons issued against the 4th Defendant on 16/12/10, which was duly served upon the 2nd and 3rd Defendant`s advocates on 21/12/10 and summons issued against the 4th Defendant on 16/12/10 which was duly served together with the further amended plaintiff upon the 4th Defendant on 17/12/10. An affidavit of service sworn by MWAVUO MORRIS NGONYO on 17/12/10 was filed in court on 20/12/10.
2. The 4th Defendant has neither entered appearance nor filed any defence and served the same on the Plaintiff`s advocate as at the time of filing this application.
3. The 4th Defendant is the duly registered owner and proprietor as Lessee of the suit property Title No.CHEMBE/KIBABAMSHE/404 pursuant to a transfer registered on 07/09/10.

4. The 1st, 2nd and 3rd Plaintiffs who were the original registered owners and proprietors of the suit property prior to the transfer, which followed a series of court cases and decree dated 22/01/09 in Malindi HCCC 53 Of 2006 (O.S) pursuant to an agreement dated 15/09/08, a transfer dated 22/04/09, and Power of Attorney dated 22/04/09, all of which are part of proceedings herein, duly transferred the property to the 4th Plaintiff at a consideration which means that 1-3rd Plaintiff no longer hold any claim over the property except for purposes of delivery of vacant possession to the new owner i.e 4th Plaintiff. It is in this context that applicants state that 2nd, 3rd and 4th Defendants are trespassers on the suit property and should yield vacant possession or be evicted there from since they have no right to continue staying there.

The 2nd and 3rd Defendants have not filed any amended defence and from their original defence, their claim lies with the person, company or entry which purported to sell to them the shares in the Company(which never owned the property at any time, as is clear from the records of Title which are part of these proceedings.

Eviction should therefore be immediate and what should await determination are issues of mesne profits and damages for trespass because this is a case where the Title holder is being kept away from portions of the property occupied by trespassers and the solution lies in the court giving summary orders. The 1st Defendant, is now a shareholder in the 4th Plaintiff's Company and has no objection to the order being granted, having mitigated his loss by buying into the company which now owns the suit property – having equally fallen into the same predicament of losing money to con artists in the earlier dispute.

The application is supported by the affidavit sworn by **MOSES KIBUNJA KIBUI**, a director of the 4th Plaintiff who reiterates that 4th Plaintiff is the registered owner of the property as per Transfer documents and Certificate of Lease annexed page 40-43. Documents showing that the property initially belong to 1-3rd Plaintiff (being Lease, Certificate of Lease and records at the Kilifi Lands Office) are annexed at page 25-39, Also annexed are documents showing the history of various agreements entered into, culminating in the Plaintiff company owning the property and 1st Defendant obtaining shares in the said property.

In September 2009, the applicants learnt that one **SAID ADAM KAZUNGU** had fraudulently forged a court order and used it to obtain a fraudulent Title to the suit property. Applicants immediately moved to court by way of Judicial Review in Malindi HC JR NO. 13 of 2009 and obtained orders nullifying the entry – the matter is now subject of criminal investigations as the fraudster had previously forged signatures of 1st, 2nd and 3rd Plaintiff and obtained some meony from **MR GIUSSEPPE PASSAGLIA in HCCC No. 204 of 2005**, and was arrested and charged in court as per copy of Charge Sheet annexed at page 48-50. A new inquiry file No. 8 of 2009 has been forwarded to the AG's office (DPP) for action.

All these annexures are intended to demonstrate that Respondents 2-4 are trespassers on the suit property and they have no defence to the claim for ownership, unlike the 1st Defendant who mitigated his losses by buying into the 4th Plaintiff Company. The other Defendants slept in their rights and cannot continue to remain on the property.

It is further stated that the 4th Plaintiff is now desirous of commencing development on the suit property and has started construction of a perimeter wall thereon, so unless, the orders for vacation or eviction issue, then 4th Plaintiff/Applicant will continue to lose on its investment and all development plans on the property will be wasted and/or lost, and such loss will be irrecoverable.

The 1st Defendant/Respondent **PASSAGLIA GIUSEPPE**, has sworn a replying affidavit dated 8/2/11 in which he states that he does not oppose the Notice of Motion and concedes the prayers sought by applicants, since the applicants have in their further amended plaint dated 15/12/10, indicated that they have no claim against him. He confirms that 4th Plaintiff is the registered proprietor of the suit property and explains that in 1998, he had entered into an agreement with me **ROBERT KAINGU MAITHA**, (now deceased) for purchase of the said property and he even begun constructing villas on the property.

That is when he got to discover that 1-3 Plaintiffs were the registered owners of the suit property – as a result, he was unable to obtain the Title from the said **ROBERT KAINGU MAITHA**.

In the year 2004/2005, he was approached by **SAID ADAM KAZUNGU** who claimed to be the registered owner of the suit property, having obtained it from 1-3rd applicants through a Power of Attorney. 1st respondent believed him, and in a bid to save the villas he had constructed, he paid **SAID ADAM KAZUNGU** Kshs.79,000/- in 1998. While awaiting the transfer documents, 1st Defendant/Respondent decided to contract **MOHAMED AMIN**(2nd Plaintiff/Applicant) after obtaining his contacts in Nairobi's Industrial Area, and was shocked to learn that the power, surrender of Lease, Letters from Director of Surveys and Title were all fake. 1st Respondent reported the matter to Malindi Police Station and **SAID ADAM KAZUNGU** was eventually arrested on 30/06/05 and charged in CRC No. 1446 of 2005(MALINDI COURT) with three counts of fraud, making false documents and obtaining money by false pretences. Due to the several competing interest on the property, the disputes went to court in HCCC 53 of 2006. There followed negotiations and agreements, 1st Respondent decided to cut his losses by securing his interest in the suit property through the 4th Plaintiff company – this was so as to avoid losing the money and investment.

The 2nd and 3rd Respondents have filed grounds of opposition and a notice of preliminary objection. They oppose the application for summary judgement, saying:-

1. The procedure under Order 36 Under which the application is made, does not apply to the orders sought by the Plaintiffs/Applicants.
2. The application under the said procedure for recovery of land is permitted only to a landlord seeking to recover land from a tenant whose tenancy has expired or against persons claiming against such tenants or trespassers.

The Notice of preliminary objection is to the effect that this court has no jurisdiction to entertain the application or even grant the reliefs sought under Order 36 Rule 1 of the Civil Procedure Rule. Secondly that Order 36 is applicable to and points only to a landlord seeking recovery of land from a tenant whose term has expired or a person claiming under him or trespasser and is therefore not available to the applicants. The 1-3rd applicants are said to have no locus in this application.

The 4th Respondent **DANIELLA OLMO D'ALLESSANDRO** swore a replying affidavit dated 11th February 2001 in which she opposes the Notice of motion saying it is clearly intended to pre-empt the due process of having the suit heard on merit. She relies entirely on her statement of defence and points out that she has raised issues of fraud, estoppel, limitation of action and other issues vital to the defence.

It is her contention that the summary judgement is intended to deny her an opportunity of being heard as recognized by the principles of natural justice, saying she needs to cross-examine 1st Respondent at the main hearing with a view to exposing the hidden agenda and this Notice of motion is seen as an afterthought.

At the hearing of the application **MR K'OPERE** submitted that what applicant seeks is for recovery of the suit property against 2nd and 3rd Defendants who are trespassers. He explains that the, 4th Defendant is currently the registered owner of the suit property as confirmed by the Title documents (at page 40) – which Title was previously in the names of 1st, 2nd and 3rd Defendants who had been given a Government lease. He invited the court to consider all the transaction documents (which are found at page 24-39 of the annexures), and submits that at no point is any of the Defendants named as a purchaser nor have they registered their interest. **MR K'OPERE** contends that although it is argued that 4th Plaintiff obtained Title when there was an embargo, there was an exemption given by the Commissioner of Lands vide a letter appearing at 24 dated 2nd September 2010 signed by Z.A. MABEA(The Commissioner of Lands)

and which reads;-

“PRESIDENTIAL CONSENT TO TRANSFER CHEMBER/KIBABAMSHE/404

“The Government has consented to the transfer of the above property to Kibokoni Properties Limited.....” and this was pursuant to a decree given by this court. Counsel argues that there is no triable issue raised by the defendants and despite claims that they bought part of the property or villas which they occupy, there is not a single sale agreement annexed yet section 3 of the Law of Contract is so clear, that one cannot sustain a claim on sale of land unless one extracts an agreement duly executed by parties, duly stamped and duly attested. It is his contention that this has not been done, and instead the 4th Defendant refers to a charge sheet where one **SAID ADAM** was charged in Criminal case 1446 of 2005 for the offences on three counts;-

(a) Making a document without authority contrary to section 357(a) Penal Code – the document being a power of attorney purportedly signed by MOHAMED AMIN, MOHAMED YUNIS and MOHAMED ISHAQ(who incidentally, are the Plaintiff`s in the present suit)

(b) Making a document without authority contrary to section 357(a) Penal Code where there was a letter purported to have been written and signed by the Director of Surveys.

(c) Obtaining money by false pretences contrary to section 313 Penal Code where the named SAID ADAM KAZUNGU allegedly received a sum of Kshs.572,000/- from D`ALLESANDRA ALLESANDRO by falsely pretending to be the owner of the parcel 404/Chembe/Kibabamshe(i.e the same property in issue here, MR K`OPERE`s argument is that the 4th Defendant made the payment to a fraudster and that alone disentitles her from sitting on the property. The 2nd and 3rd Defendants say they bought the property from a company called SIKA LTD who posed as the owners of the property and also helped in construction of the villas – so they have filed a counterclaim against the 1st Defendant, and Mr K`OPERE insists that does not entitle them to the property as they can recover the money from the 1st Defendant. He points out that Order 36 allows for recovery of land from a landowner or trespasser and 2nd and 3rd Defendant cannot refuse to move out of the property simply because they paid money to other parties.

Mr MATINI who represents 1st Defendant/Respondent informed this court that he did not oppose the application and relied on the affidavit sworn by 1st Defendant (dated 8th February 2011 where 1st defendant explained that the Applicant/Plaintiffs do not have any claims against him. He also confirms that 4th Plaintiff is currently the registered owner of the suit property, having received a Transfer from 1, 2, 3 Plaintiff pursuant to the Decree in Malindi HCCC No. 53 of 2006(O.S). He explains how he too got sucked in the fraud perpetrated by **SAID ADAM KAZUNGU** and entered into a sale agreement and even paid for the property, only to realize it was a fraud based on fraudulent documents. He decided to mitigate his loss by securing his interest on the suit property through the 4th Plaintiff Company shown by annexure MKK.

MR SIMIYU for 2nd and 3rd Respondents opposes the application saying the operative word here is **LANDLORD**, and nowhere is it pleaded that the 2nd and 3rd Plaintiff were the landlords to the 2nd and 3rd defendants and the plaint and affidavits have no averments to that effect and counsel cannot give evidence from the bar to claim that 2nd and 3rd defendant s are trespassers or that they are not tenants. It is his contention that Order 36 contemplates a situation where the Defendant has appeared but not filed defence – yet in the present instance the defendants have filed defence, so an application for summary judgment is improper and the court lacks jurisdiction to make such orders. He argues that the defence raises triable issues and under the 2010 Constitution of Kenya, parties have a right to be heard, so 2nd and 3rd Defendant ought to be given a chance to be heard.

Further, he submits that sufficient notice was not given in this matter as 2 & 3 Defendants were not given enough time (the minimum being seven (7) days).

MR MICHIRA on behalf of 4th Defendant/Respondent also opposes the application saying the statement of defence clearly raises the issue of fraud, malice and estoppel and that at the time the Title was issued, there was an embargo and the Title was issued when corruption was rampant in Kenya. As far as he is concerned, the embargo was not lifted, because such a process ought to have been done through the Kenya Gazette, which is the provision Government uses to validate its action and gave notice. **MR MICHIRA'S** contention is that the letter by the Commissioner of Lands giving consent to issue Title is invalid and illegal and the issue of fraud cannot just be wished away by a charge sheet yet the criminal matter has not been finalized. He urges this court to consider the provision of Order 36 (1) (b) whose terms, he says, are very clear and the 4th Defendant cannot be regarded as a trespasser. He pokes holes at the affidavit sworn by 4th Defendant, saying it is intended to pre-empt the defence case and is a collision between 1st Defendant and the Plaintiffs to the detriment of the other Defendants and the application simply intends to have the matter summarily concluded without being heard on merit, and this will mean crucial witnesses would be shut out.

MR K'OPERE is insistent that Order 36 Rule 1B relates to recovery of land by a landlord, tenant OR against a trespasser – which presupposes that there is a trespasser, and if there is a trespasser, then the issue of landlord/tenancy does not arise. He insists that even if the issue of fraud is claimed, it is not the Plaintiff/applicant who were fraudulent.

The further amended plaint dated 16/12/10 refers to a decree issued in Malindi HCCC No.53 of 2006 while the suit property was duly transferred and registered into the name of the 4th Plaintiff – who now seeks vacant possession.

The villas standing on the property were constructed by the 1st Defendant, the other Defendants thereafter moved in. As far as applicants are concerned following the consent order recorded in HCCC NO. 53 of 2006(O.S). The prayer for which summary judgement is sought is prayer (b) which seeks that an order directed at the Defendants to cease all acts of trespass upon and or Title No. Chembe/Kibabamshe/404 forthwith vacate and render to the Plaintiffs vacant possession of Title No. Chembe/Kibabamshe/404 in default an order of eviction to issue and be executed by the Court Bailiff. Order 36 Rule 1 (1b) provides that;-

“(i) In all suits where a Plaintiff seeks judgement for the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non payment of rent or for breach of covenant or against persons claiming under such tenant or against a trespasser,

Where the defendant has appeared but not filed a defence, the Plaintiff may file for Judgement for the amount claimed or part thereof....., for recovery of the land and rent or mesne profits”

My understanding is that the relief sought here is for recovery of the land – on the basis of trespass – which fits in with what is contemplated by the above provision – **BUT** it seems to contemplate a situation where the Defendant has entered appearance but not filed a defence. **MR K'OPERE'S** position is that the 2nd -4th Defendants have not filed a defence to the further amended plaint, hence the present application – that is correct. I therefore find no fault in the application which is before court, it fits in with the provisions of Order 36 rule 1 (1) (b).

Are there any triable issues raised? There is the issue of fraud – but **MR K'OPERE** says the fraud is not alleged against the Defendant but against a Third Party who is not joined in this suit, but has been charged in a criminal case. So if the defendants wish to recover any reliefs it would be from the alleged fraudster, while that may be a very sound position – there isn't a single document annexed to demonstrate to this

court that the documents which Defendants rely on to claim rights over the property (and which are subject of the criminal proceeding) have been proved to be so – it would seem that the criminal case has not been concluded, so whether 2nd -4th Defendants acquired the property from a person who defrauded them becomes a triable issue. From this court's ruling of HCCC 15 of 06, what was nullified was a purported consent entered into, and which became subject of criminal investigations. The issue of fraud regarding the documents has not been concluded and is a triable issue. Secondly there is the issue regarding the embargo which had been placed by the Minister for Lands in relation to Land falling within Chembe/Kibabamshe, Jimba/Madeteni areas which was by way of gazette notice – and whether the letter by Commissioner of Lands giving consent to the transaction amounts to a violation of the embargo. Should exceptions to the embargo have been by way of a gazette notice? I think that is also a triable issue. As long as even one triable issue is demonstrated this summary judgement cannot be entered. I therefore decline to grant the prayers sought and the application is dismissed with costs to the 2-4th Respondents.

Delivered and dated this 15th day of June 2011 at Malindi

H A OMONDI

JUDGE

Mr Matini for 1st Defendant and holding brief for Mr K'opere

Mr Michira for 4th Defendant

No appearance for 2nd and 3rd Defendant